

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT- II)

Item No. 204
(IB)-223(ND)2020
IA- 5164/2023, IA- 5166/2023

IN THE MATTER OF:

M/s. D. Light Energy Private Limited ... **Applicant/Petitioner**

Versus

M/s. Benchmark Supply Chain Solution Private Limited ... **Respondent**

Under Section: 9 of IBC, 2016

Order delivered on 05.06.2024

CORAM:

SH. ASHOK KUMAR BHARDWAJ
HON'BLE MEMBER (J)

SH. SUBRATA KUMAR DASH
HON'BLE MEMBER (T)

PRESENT:

For the Applicant : Sr. Adv. Arvind Nayyar, Adv. Aniket Gautam,
Adv. Aaditya Kapoor, Adv. Akshay Joshi, Adv.
Mehreen Garg, Adv. Siddharth

For the Respondent : Adv. P. K. Sachdeva for Respondents 2 & 3

For the Liq. : Adv. Rajiv Malik and Mohit Kumar Gupta

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

IA-5164/2023: On perusal of the application, we could find that the averments made therein are nebulous and vague. The Applicant has not even cared to mention the amount, which according to him, the Respondent should contribute to the Corporate Debtor and an amount, which could be taken out of the funds and assets of the Corporate Debtor as a result of fraudulent transactions. Let a specific affidavit be filed by the Applicant, indicating therein, the specific calculation of the amount, which according to him, the Respondents need to contribute to the Corporate Debtor. The affidavit would

also indicate the documentary evidence relied upon by the Applicant to arrive at a conclusion.

List on 30.06.2024.

IA-5166/2023: The captioned application has been preferred under Section 43 of IBC, 2016 read with Rule 11 of NCLT Rules, 2016, seeking direction against the Respondents for restoration of the amount of Rs. 3,67,900/-, received by the unsecured creditor qua the Corporate Debtor during the look back period.

It is not in dispute that the CIRP commenced on 17.05.2022. The Transaction Audit Report was conducted by KRA and Company, Chartered Accountant, H-1/208 Garg Tower, Netaji Subhash Place, Pitampura, Delhi-110034. As can be seen from the Report dated 30.05.2023, the transaction auditor could take note of the scope of its work and recorded in the Report that the scope includes the following:

Our Scope of work includes the following:

1. Section 43: Preferential Transactions – 02 years for related parties and 01 years for Others
2. Section 45: Undervalued Transactions – 02 Years for related parties and 01 year for Others
3. Section 50: Extortionate Credit Transactions - 02 Years for all parties
4. Section 66: Fraudulent Transaction – 5 Years

In clause 2.1 of the Report, the Transaction Auditor could take note of the definition of the Preferential Transactions which reads thus:

2.1 Preferential Transactions

Corporate debtor shall be deemed to have given a preference, if there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and such transfer has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 43 of IBC 2016.

In Clause-V of the Report, the Auditor has mentioned the examination method adopted by it. The clause reads thus:

V. AUDIT APPROACH AND EXAMINATION METHOD

1. Audit Approach

We have conducted the Transaction Audit as per the Scope of work given to us. We have performed following activities for the purpose of Audit:

2. Document Review

During the course of Audit, we have reviewed / verified various documents, which ranged from Bank Statements to Statutory Audit Reports and have relied on the same.

3. Analysis of Financial Information

We have carried out the Desktop Review of company accounting data and Audited Financials, whatever available, for the financial years that fall in our audit tenure.

4. Discussion with Liquidator

Discussions were conducted to obtain information about process and Internal Control Mechanism adopted by the CD.

5. Web-Search

We have also done web-search, including MCA, Income Tax website for various purpose /analysis.

EXAMINATION METHOD

We have adopted following two methods of Examination:

- ✓ Test of Reasonableness – to check weakness in Internal Control, to identify questionable transactions and Review of questionable transactions.
- ✓ Historical Comparison is used in Debtors and Creditors Account Balances, Loan & advances and Loan Payable account balances on sample basis. It is used to identify questionable accounts, relationship between accounts and for finding out variances.

It is important to take note that although we have examined documents as received from the Liquidator. This Transaction Audit was conducted independently, and our findings are based on the review of documentation, analytical reviews of data, and communications held with the personnel of the Corporate Debtor, if any.

In the case of non-availability of data, we have extended our source to external and available sources of information which are accentuated in the relevant sections of our report.

It is recommended that the contents of this report should be read in the light of scope as defined above and its limitations.



The Part-VI of the Report gives details of Source of Information which reads thus.

VI. SOURCE OF INFORMATION

To conduct the Transaction audit following Information, documents and records were reviewed:

1. Standalone Financial Statements
2. Data from Company's accounting Software's.

Books of accounts	Data Provided (Y/N)
Tally Data (FY 2017-18) to (FY 2021-22) upto 31.08.2021	Yes
3. Relevant records & information from MCA website and other public sources
4. We have relied upon whatever documents/records provided by the Liquidator for our audit purpose.

As can be seen from the Source of Information (ibid), the Audit was for the Financial Year 2021-22 up to 31.08.2021. The period was covered by the look back period as prescribed in Section 43(4) of IBC, 2016.

As can be seen from the executive summary mentioned at page 28 of the Report/application, preferential transaction of Rs. 3,67,900/- was made in favour of Mr. Alok Tripathi against his outstanding secured loan. The Executive Summary reads thus:

IX. EXECUTIVE SUMMARY

Particular	Amount Involved
A. Preferential Transaction -	
Payment made to Mr. Alok Tripathi against his outstanding unsecured loan	3,67,900
B. Undervalued Transaction	Nil
C. Extortionate Credit Transactions	Nil
D. Fraudulent Transactions	
Diversion of funds amounting to Rs. 85 Lakhs to Mr. Vijay Thapar	85,00,000
Suspected Diversion of funds through sale to various parties and debtors outstanding	4,59,77,335
Diversion of goods received back by the CD on the sales return.	61,09,816
Diversion of funds through write off entry in books of accounts	4,30,650

We granted sufficient opportunity to Respondent to file the reply, but the same was not availed. Thus on 02.05.2024 we had to pass the following order:

IA-5164/2023 & IA-5166/2023: In terms of the order dated 19.02.2024 one last opportunity was granted to Respondents to file their reply within one week. On 20.03.2024, when the proceedings qua Respondent No. 1 were directed to be set as ex parte, the Respondent Nos. 2 & 3 were given further last opportunity to file their reply subject to payment of cost of Rs. 25,000/-. Though the Ld. Counsel for said Respondent Nos. 2 & 3 could screen share the receipt of payment of cost, but he sought further extension of time to file reply. The reason given by him for being not in a position to file reply is that the Registry is not co-operating with him. If such could be the reason, the Respondents could mention before this Tribunal on 19.02.2024 or on 20.03.2024. We cannot be oblivious of the fact that between 19.02.2024 and

20.03.2024 the said Respondents had 30 days' time to take required steps and from 20.03.2024 till today (02.05.2024) they had another 40 days' time to file reply. From the conduct of the Respondent Nos. 2 & 3 it is apparent that they are not interested in filing any reply and are just delaying the proceedings.

In the wake, their right to file reply is forfeited.

List on 05.06.2024.

IA-1683/2024: The Ld. Counsel for the Liquidator submitted that on account of pendency of the avoidance application and there being no decision taken in terms of the provisions of Regulation 44A of IBBI (Liquidation Process) Regulations, 2016, the period of liquidation process need to be extended by another 3 months. In view of the averments made in the application and the submissions put forth by the Ld. Counsel for the Liquidator **the IA is allowed** and the period of liquidation process is extended by 60 days.

The application stands disposed of.

Today, again Mr. Sachdeva, Ld. Counsel appearing for Respondents No. 2 and 3 submitted that he has preferred an application for recalling order dated 02.05.2024(ibid). He requested for an adjournment, to await the listing of the application. In the same breath, he also argued that the Respondents do not have the funds available to pay.

As can be seen from Section 43 of IBC, 2016, where the liquidator or the Resolution Professional, as the case may be, is of the opinion that the Corporate Debtor has at the relevant time given a preference in such

transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for the avoidance of preferential transactions and for, one or more orders referred to in Section 44.

Apparently, even when any amount was payable to Mr. Alok Tripathi qua his outstanding secured loan, he could stake his claim before RP/Liquidator and could get his share in terms of the provisions of Section 53 of IBC, 2016. Section 43(2)(a) of the IBC, 2016 provides that Corporate Debtor shall be deemed to have given a preference, if there is transfer of property or any interest thereon of the Corporate Debtor for the benefit of a Creditor or the surety or a guarantee or on account of an antecedent financial debt or operational debt or other liabilities owned by the Corporate Debtor and the transfer has the effect of putting such creditor or a surety or a guarantor in the beneficial position than it would have been in the event of distribution of assets being made in accordance with Section 53.

Apparently, when the aforementioned payment could be made to Mr. Alok Tripathi against his outstanding unsecured loan, he was put in a beneficial position, as in terms of provisions of Section 53 of IBC, 2016, the Secured Creditors and workmen get precedence regarding the payment of the dues over unsecured creditors.

In such cases where the Corporate Debtor enter into preferential transaction, in terms of the provisions of Section 44(1), this Tribunal can inter-alia require

any person to pay such some in respect of benefit received from the Corporate Debtor by him. The provision of Section 44 (1) (b) (d) reads thus:

“44. Orders in case of preferential transactions. –

(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:

(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;

(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;”

In view of the aforementioned, particularly with reference to the Transaction Audit Report, we allow the present application and direct Mr. Alok Tripathi to pay back Rs. 3,67,900/- to the Liquidation amount of the Corporate Debtor.

It goes without saying that while distributing the assets/funds/properties of the Corporate Debtor, the Liquidator shall take into account the claim of aforementioned amount of Mr. Alok Tripathi also and would distribute the amount due to him against the aforementioned amount, as per waterfall mechanism, viz. Section 53 of IBC, 2016.

The application stands disposed of.

**Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)**

**Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**